(2)

No. 88-1847

In The

Supreme Court of the United States

October Term, 1988

FORD MOTOR CREDIT COMPANY, INC.

Appellant,

v.

STATE OF FLORIDA, DEPARTMENT OF REVENUE,

Appellee.

ON APPEAL FROM THE DISTRICT COURT OF APPEAL OF FLORIDA, FIRST DISTRICT

MOTION TO DISMISS OR AFFIRM

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QUESTIONS PRESENTED

The principal question presented by this Motion to Dismiss or Affirm is whether the "Internal Consistency Test," which forms the backbone of Appellant's argument, applies[1] to Florida's tax on intangible personal property, where:

(a) The intangible property taxed by Florida was property which had acquired a legitimate situs within Florida.

[1]FMCC and Amici Curiae misstate the questions presented.

The District Court of Appeal of Florida, First District, did not create any new law but instead, relied upon well established decisions of this Court, particularly the decisions in Curry v. McCanless, 307 U.S. 357 (1939) and State Tax Commission of Utah v. Aldrich, 316 U.S. 174 (1942).

Moreover, the question presented is not whether intangible personal property is "per se" excepted from the internal consistency test but rather, whether that test has ever been applicable to a tax on intrastate property, which has never crossed state lines.

(b) The taxed intangible property never crossed state lines to enter the stream of interstate commerce. and,

(c) Florida restricted the tax base to that portion of FMCC's intangible personal property which was actually located, at all pertinent times, within Florida's geographical boundaries, so as to eliminate the necessity of apportioning from a nationwide intangible tax base.

Additionally, two preliminary questions are presented by this appeal:

1. Whether FMCC's Jurisdictional Statement, which is not in compliance with 28 U.S.C. §1257 (1982), as amended by Pub. L. 100-352, §§3, 7, 102 Stat. 662 (1988), should be treated as a petition for certiorari and not as a direct appeal of right. and,

2. Whether FMCC, as a foreign domiciliary, has standing to challenge that portion of Florida's tax which permits taxation of Florida domiciliaries and which does not affect FMCC.

PARTIES TO THE PROCEEDING BELOW

The parties to the proceedings below were: Ford Motor Credit Company, Inc. (hereinafter, "FMCC"), Appellant herein, and the Florida Department of Revenue, (hereinafter, "Florida"), Appellee herein.

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OF FLORIDA, FIRST DISTRICT

MOTION TO DISMISS OR AFFIRM
THIS IS NOT AN APPEAL AS OF RIGHT AND THE QUESTIONS PRESENTED ARE INSUBSTANTIAL

Pursuant to Sup. Ct. R. 16 and 22 the Appellee, State of Florida, moves to dismiss this appeal, or to affirm the decision of the District Court of Appeal of Florida, First District, because this appeal (which is actually a petition for certiorari) does not present a substantial federal question.

All issues raised by the Appellant have been foreclosed by prior decisions of this Court. The decision of the District Court of Appeal of Florida, First District, is consistent with prior decisions of this Court, many of which are cited in the decision below, and it is manifest that the questions on which the decision in this cause depends are so insubstantial as not to need further review.

Moreover, the decision below is consistent with this Court's decisions in Curry v. McCanless, 307 U.S. 357 (1939) and State Tax Commission of Utah v. Aldrich, 316 U.S. 174 (1942).

JURISDICTION

Although this Court has certiorari jurisdiction, this Court lacks appeal jurisdiction for the reasons set forth in argument I.

STATUTORY PROVISIONS INVOLVED

This appeal (which should be treated as a petition for certiorari) raises questions of whether Florida's intangible personal property tax, as set forth in Florida Statute §199.112(1) (1983), violated the Commerce Clause. U.S. Const. art. I, §8, cl. 3.

Florida Statute §199.112(1) (1983) provided:

> (1) All bills, notes, or accounts receivable, obligations, or credits, wheresoever situated, arising out of, or issued in connection with, the sale, leasing, or servicing of real or personal property in the state are subject to taxation under this chapter, it being the legislative intent to provide that such intangibles shall be assessable regardless of where they are kept, approved as to their creation, or paid. This provision shall apply to any person representing business interests in the state that may claim a domicile elsewhere, the intent further being that no nonresident, either by himself or through an agent, transact business in the state without paying the same tax which the state would impose on residents transacting the same business. Sales of tangible personal property are in this state if the property is delivered or shipped to

a purchaser within this state, regardless of the f.o.b. point or other conditions of the sale. The provisions of this section shall in no way be construed to alter the tax status of intangibles not connected with the sale, leasing, or servicing of real or personal property in the state.

STATEMENT OF THE CASE

The following facts were not clearly stated in FMCC's jurisdictional statement.

A. Although FMCC's tangible personal property (i.e., vehicles) was shipped in interstate commerce, the challenged tax was not imposed on FMCC's vehicles. See, App. 9, item 11 and App. 10 to FMCC's Jurisdictional Statement.

B. Although promissory notes belonging to FMCC were stored outside of Florida, there is no evidence in the record below that the underlying financial obligations, which the notes merely represent, and which constitute the taxed property, ever moved

in interstate commerce.[2]

C. There was no evidence introduced in the record below that FMCC ever made tax payments to any state other than Florida.

D. FMCC has not established the quantity of nationwide intangible personal property owned by FMCC which would form the total tax base if Florida were constitutionally required to utilize an apportionment system in imposing its intangible personal property tax.

Moreover, FMCC's jurisdictional statement contains misstatements. Contrary to the statement made in FMCC's Jurisdictional Statement at page 6, there was no finding of fact by any court below that

[2] Although Amici Curiae also allege (at page one of of their Jurisdictional Brief) that their intangible assets are used in interstate commerce, this allegation, which is not part of the record on appeal, should not form a basis for accepting review where there is no evidence in the record below that any of the taxed intangibles at issue entered the stream of interstate commerce.

title to the vehicles passed outside of Florida. However, there was an express stipulation of fact that "the certificate of origin usually accompanied the car to the [Florida] dealer." See, 3a., Prehearing Stipulation, Exhibit 7.

A certificate of origin is required in order to obtain a certificate of title from the Florida Department of Motor Vehicles. Fla. Stat. §§319.21, 319.22 (1983). The Florida certificate of title transfers title to the Florida consumer upon sale by the Florida dealer to the Florida consumer. Fla. Stat. §319.22 (1983).

FMCC appends the Final Order of the Department of Revenue. The Final Order of the Department of Revenue states in its Finding of Fact number 15: "Wholesale and retail intangibles were created and handled in 1980, 1981 and 1982 by FMCC in the manner set forth in Exhibit 7." App. 11 to FMCC's Jurisdictional Statement. (e.s.)

However, FMCC's Jurisdictional Statement does not include the crucial exhibit 7 to prehearing stipulation within its appendix. Therefore, Exhibit 7 is set forth in its entirety as an appendix to this motion.

The significant contents of Exhibit 7 are summarized below.

1. Solicitation of Dealer Members: "At the wholesale level, the local Florida FMCC branch solicited participation by Florida Ford dealers." 1a.

2. Some Branch Approval of Dealer Credit: "During 1980 and 1981, the number of dealers approved locally was approximately 6%. In May, 1982, . . . the number of branch approvals increased to approximately 35%." 2a.

3. Retail Credit Approval: Although the stipulated facts specify that dealer [i.e., wholesale] credit was approved both in Florida and outside of Florida, the

stipulated facts did not expressly specify whether retail [i.e., consumer] credit was approved by a Florida FMCC branch or by Michigan headquarters. However, a reasonable inference from the stipulated facts is that consumer credit was approved by a Florida FMCC branch.

4. Dealer Payments Made in Florida: "The [Florida] dealer made monthly payments to the Florida FMCC branch, which in turn made daily deposits to an account with a Florida financial institution." 3a., 4a.

5. Vehicle Satisfactions Accomplished in Florida: "When the [Florida] dealer sold the car, either at retail or via dealer trade, the dealer made its payment on the wholesale receivable to the Florida FMCC branch." 4a.

If a consumer wished to arrange for a loan payoff on sale of a vehicle or for other reasons, the Florida branch office of FMCC directly handled the matter and

arranged for satisfaction of the lien with the Florida Department of Motor Vehicles. See, 11a.

6. Dealer Audits Performed By Florida Branches: "[T]he FMCC [Florida] branch also performed audits of [Florida] dealers to insure [that the] cars were not sold out of trust (i.e., without notice of the sale and satisfaction of indebtedness owed FMCC)." 6a., 7a.

7. Consumer Payments Made In Florida: "The consumer received a payment book. Payment was made to a FMCC [branch] in care of a Florida Financial institution. . . [a] consumer could also make walk-in payments directly at an FMCC branch." 10a.

ARGUMENT

I. FMCC'S JURISDICTIONAL STATEMENT, WHICH IS NOT IN COMPLIANCE WITH 28 U.S.C. §1257 (1982), AS AMENDED BY PUB. L. 100-352 §§3, 7, 102 STAT. 662 (1988) SHOULD BE TREATED AS A PETITION FOR CERTIORARI AND NOT AS A DIRECT APPEAL OF RIGHT.

FMCC's "Jurisdictional Statement" relies upon the jurisdictional provisions of 28 U.S.C. §1257(2) (1982), which has been amended, effective September 25, 1988 by Pub. L. 100-352 §§3, 7, June 27, 1988 (hereinafter, "the amendment").

Effective September 25, 1988, the proper procedure for seeking United States Supreme Court review of a decision of the highest state court in which review could be had is to file a petition for a writ of certiorari. See, 28 U.S.C. §1257(a) (1989). Therefore, FMCC should have filed a petition for certiorari, which seeks discretionary review, rather than appealing directly as of right.

Although there are certain narrow and inapplicable savings provisions which limit the effect of the amendment, FMCC's appeal falls outside either of the savings provisions contained within the amendment.

Those savings provisions specify that the amendment shall not affect cases pending before the Supreme Court as of the effective date of amendment and shall not affect the right to review or the manner of reviewing the judgment or decree of a court which was entered before such effective date. These provisions are inapplicable to the instant appeal.

This appeal was not filed until May 1989, well after the September 25, 1988 effective date of the amendment.

Moreover, the decision of the First District Court of Appeal did not become

final until after the effective date of the amendment.[3]

Since the decision below was not rendered until after the effective date of amendment, the savings provision for decisions rendered before the effective date of amendment is inapplicable and a petition for certiorari should have been filed instead of a Jurisdictional Statement.[4]

[3]Although the original decision was filed September 13, 1988, the decision expressly provided that it was "NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING MOTION AND DISPOSITION THEREOF IF FILED." See, bold typed provision at the beginning of the Court's decision, which is contained in App. 1 to FMCC's Jurisdictional Statement. See also, Fla. R. App. P. 9.020 (g) (1988).

[4]FMCC admits on page 1 of its "Jurisdictional Statement," that a timely motion for rehearing was denied on October 12, 1988. Furthermore, on page 1 of FMCC's Jurisdictional Statement, FMCC admits that the Florida Supreme Court did not decline review until February 22, 1989. Both events occured after the date of the amendment.

Therefore, the State of Florida respectfully suggests that FMCC's "Jurisdictional Statement" should be treated as a petition for certiorari and not as a direct appeal of right and that, if FMCC's "Jurisdictional Statement" is treated as a petition for certiorari, then, that this Motion to Dismiss or Affirm be treated as a brief in opposition to the petition for certiorari.

However, regardless of whether this Court treats the Jurisdictional Statement as a direct appeal or as a petition for certiorari, Florida argues that since the federal questions presented by this appeal are not substantial, and since FMCC lacks standing to challenge that portion of Florida's intangible personal property tax statute which taxes Florida domiciliaries, this Court should either grant Florida's Motion to Dismiss or Affirm (if this appeal is treated as a direct appeal) or deny

discretionary review (if the "Jurisdictional Statement" is treated as a petition for certiorari).

The issues involving lack of a substantial federal question and lack of standing are separately addressed below.

II. THIS CASE DOES NOT PRESENT A SUBSTANTIAL FEDERAL QUESTION.

In the following subparts of this Motion, the State of Florida presents a variety of reasons for dismissing the appeal or affirming the decision below (if this appeal is treated as a direct appeal) or for denying review (if this appeal is treated as a petition for certiorari).

An overview of Florida's argument at this point would be helpful.

Fla. Stat. §199.032(1) (1983), imposes a tax on "intangible personal property" as defined in §199.023(1)(a). Fla. Stat. §199.023(1)(1983) defines intangible

personal property to include virtually any "obligation[s] for the payment of money," including accounts receivable.

Although taxable obligations include unconditional written obligations, such as promissory notes, the tax differs from a documentary tax in that the underlying intangible obligation is the subject of the tax. For this reason, the fact that a promissory note may be located outside of Florida will not affect tax liability provided that the underlying obligation or receivable is in Florida. See, Fla. Stat. §199.112(1) (1983) which provides for taxation of "obligations" regardless of "where they are kept, approved as to their creation, or paid." See also, State ex. rel. Seaboard Air Line Co. v. Gay, 160 Fla. 445, 35 So.2d 403, 409 (1948).

Although the original promissory notes which document or represent the underlying obligations or receivables were stored

outside of Florida, there was no evidence introduced below that the underlying intangible obligations, which constitute the taxed property, left the State of Florida to enter the stream of interstate commerce.

The majority of the intangibles in question were accounts receivables held by FMCC and owed by Florida debtors in connection with the purchase of tangible personal property shipped to or located in the state of Florida. There is no evidence in the record that the factors which tied the property to Florida changed or diminished over time.

Nor was any evidence entered below that the underlying obligations entered the stream of interstate commerce or that Florida attempted to tax any property belonging to FMCC which was located outside the boundaries of Florida.

The only property tax cases cited by FMCC are cases involving tangible personal property which had moved or which was about to move across state lines to enter the stream of interstate commerce. See, for example, Pullman's Palace Car Co. v. Commonwealth of Pennsylvania, 141 U.S. 18 (1891).

These cases are distinguishable because the taxed property was in transit through more than one state. Where property is in transit between several states, more than one non-domiciliary state could attempt to tax the same property by asserting itself to be the place of actual situs. In these situations, this Court required apportionment among the states of actual situs, which reduced the tax base available to the domiciliary state.

However, where the property is not in transit and has acquired an actual situs (as opposed to a fictitious domiciliary

situs) solely within the boundaries of a single non-domiciliary state, there is no need to apportion. The fact that the same property could constitutionally be taxed by both the domiciliary state and the state of actual situs does not present the same problem which arises when multiple non-domiciliary states attempt to tax the same property in full. See, Curry v. McCanless, 306 U.S. 357 (1939) State Tax Commissioner of Utah v. Aldrich, 316 U.S. 174 (1942).

Since Florida is taxing loans arising from the sale of automobiles and not the automobiles. The fact that vehicles were shipped in interstate commerce is of no constitutional relevance. The taxed intangible property has a business situs solely intrastate.

The remaining cases relied upon by FMCC are excise tax cases wherein a state seeks to directly tax interstate activity, even though the taxed portion of that interstate

activity can be said to have occurred intrastate. These excise tax cases are clearly distinguishable because Florida does not seek to tax FMCC's interstate activities.[5]

Obviously, there may be a need to apportion between states when interstate activity (or an intrastate aspect of interstate activity[6]) is the subject of

[5]See American Trucking Associations, Inc. v. Scheiner, 483 U.S. 266 (1987); Armco, Inc. v. Hardesty, 467 U.S. 638 (1984); Container Corporation of America v. Franchise Tax Board, 463 U.S. 159 (1983) and Tyler Pipe Industries v. Washington Department of Revenue, 483 U.S. 232 (1987).

[6]Commonwealth Edison Co. v. Montana, 453 U.S. 609 (1981), which upheld a state tax on a local aspect of interstate activity, and which is cited by Amici Curiae on page 7 of their Jurisdictional Brief is of no guidance in this case. Although intrastate activity (such as mining) may form a part of a larger interstate activity (such as the shipment of coal to other states), and thus, may require Commerce Clause scrutiny, the tax in the instant case was imposed on exclusively intrastate property and not on an intrastate aspect of interstate activity.

taxation. However, since the intangible personal property in this case remained, at all pertinent times, within Florida and is the subject of taxation, the Interstate Commerce Clause, and hence, the "Internal Consistency Test," are inapplicable.

Although double taxation has not been established in this case, the fact that the domiciliary state could impose a similar tax on the same intangible personal property presents no constitutional obstacle. This Court has clearly held, in closely related Due Process cases, that in these narrow circumstances, double taxation of intangible personal property is permissable. See, Curry v. McCanless, and State Tax Commissioner of Utah v. Aldrich, supra.

The rationale of Curry v. McCanless and Utah v. Aldrich applies equally here: both the domiciliary state and the state of actual situs confer distinct benefits upon

the property which justifies the fair imposition of a distinct tax.

A taxpayer owes a duty to support its sovereign. Although the record does not reflect that FMCC contributes to the support of its sovereign by paying taxes on its intangible personal property, this duty, even if present, would not relieve FMCC of its equally compelling duty to pay for the protection of its assets which are actually located in Florida.

The record does not reveal the amount of nationwide intangible personal property owned by FMCC, of which an apportionment could be made, if (arguably) this were constitutionally required. However, since Florida only seeks to tax intrastate property which remains stationary within its boundaries, the need for apportionment, and hence, the need for the "Internal Consistency Test" does not arise.

Although FMCC seeks to distinguish Curry v. McCanless and Utah v. Aldrich, supra, as "Due Process" cases, the gap, if any between the Commerce Clause and the Due Process Clause is not as wide as FMCC would argue.

There are no cases cited by FMCC holding that a tax is constitutional for purposes of the Due Process Clause but nevertheless unconstitutional for purposes of the Commerce Clause, particularly where, as here, the tax is not "integrally related" to interstate commerce. See Opinion below at App. 4 to FMCC'S Jurisdictional Statement.

Yet FMCC argues for such a disparate result in this case by urging for a departure from Curry v. McCanless and Utah v. Aldrich simply because FMCC has invoked a separate constitutional provision.

The facts of Curry v. McCanless and Utah v. Aldrich have not been persuasively

distinguished, especially given the close link between the Due Process and Commerce Clauses. See, Ott v. Mississippi Valley Barge Line Co., 336 U.S. 169 (1949).

Finally, FMCC lacks standing to challenge those portions of Florida's statutes upon which Florida relies when taxing its Florida domiciliaries. FMCC is not a Florida domiciliary. FMCC has not been taxed as a Florida domiciliary. These portions of Florida's statutes in no way affect FMCC.

A. THE PROPERTY THAT WAS TAXED BY FLORIDA IN THIS CASE WAS PROPERTY WHICH HAD ACQUIRED A LEGITIMATE SITUS WITHIN FLORIDA.

The intangible personal property of FMCC that was taxed by Florida was solely intangible personal property which had acquired a legitimate situs within Florida. The majority of the intangibles in question were accounts receivable held

by FMCC and owed by Florida debtors in connection with the purchase of tangible personal property shipped to or located in Florida. See, Ford Motor Credit Corp. v. Department of Revenue, 537 So.2d 1011, 1012 (Fla. 1st DCA 1988); App. 2 to FMCC's Jurisdictional Statement.

Fla. Stat. §199.032(1) (1983) imposes an annual tax on certain "intangible personal property." "Intangible personal property" is defined by Fla. Stat. §199.023(1) (1983) to mean "all personal property which is not in itself intrinsically valuable, but which derives its chief value from that which it represents. . ." (e.s.) The statute, in subparagraph (1)(d), goes on to cite examples of intangible personal property and the examples include "[a]ll notes, bonds, and other obligations for the payment of money." (e.s.).

Florida's intangible personal property tax is on the underlying obligation and not on the paper which merely documents the obligation. In other words, Florida's intangible tax is not a documentary tax. It is a tax on underlying obligations, regardless of the degree of documentation or the manner by which the obligation is documented. See, State ex. rel. Seaboard Air Line R. Co. v. Gay, 160 Fla. 445, 35 So.2d 403, 409 (1948).

Because Florida's Intangible Personal Property Tax is on the underlying obligation and not on the documentation, the location of the documentation is of little significance, if any.

Florida's Intangible Personal Property Tax is more closely akin to a real property ad valorem tax than to a documentary tax. Therefore, defining situs of intangible personal property to be the situs of the documentation would be as nonsensical as

stating that the situs for taxation of real estate should be determined from the location of the deed because it is the real estate which is of primary significance and not the deed. Similarly, it is the underlying obligation which is of primary significance and not the note or other documentation of receivables.

Florida has expressly rejected the shallow notion that the document situs should determine situs of the underlying intangible. For example, Fla. Stat. §199.112(1) (1983), which defines "Business Situs," specifically provided:

> **Business situs.--**
> All bills, notes, or accounts receivable, obligations, or credits, wheresoever situated, arising out of or issued in connection with, the sale, leasing, or servicing of real or personal property in the state are subject to taxation under this chapter, it being the legislative intent that such intangibles shall be assessable regardlers of where they are kept, approved as to their creation, or paid. . . the intent further being that no nonresident, either by himself or through an

> agent, transact business in the state without paying the same tax which the state would impose on residents transacting the same business. (emphasis supplied).

Although the paperwork which documented the taxed obligations was stored outside of Florida and was, in some instances, approved for creation outside of Florida, Florida's tax is not imposed upon that paperwork, but rather, upon the underlying obligations which arose in connection with the sale of tangible personal property in Florida.

Those underlying obligations acquired a legitimate tax situs in Florida because the obligations arose in connection with the sale of tangible personal property in Florida. Moreover, the majority of the intangibles were accounts receivable held by FMCC and owed by Florida debtors in connection with the purchase of tangible personal property shipped to or located in Florida. An account receivable cannot have

value independent from the existence of a debtor.

The fact that the paperwork signed by those Florida debtors was shipped outside of Florida by FMCC cannot deprive Florida of its lawful jurisdiction to tax the underlying Florida based obligations.

Although FMCC engages in interstate activity, the tax at issue was never imposed upon the activities of FMCC in interstate commerce. Florida merely seeks to impose a property tax on intangible property which has acquired a legitimate business situs in Florida. It is constitutionally permissible for a state to tax property located within its borders. See Curry v. McCanless, 306 U.S. 357 (1939) and State Tax Commissioner of Utah v. Aldrich, 316 U.S. 174 (1942).

Most of the cases relied upon by FMCC are distinguishable excise tax cases

wherein a state sought to tax interstate activity.[7] This is because the "Internal Consistency Test," upon which FMCC completely relies, does not apply so as to restrict a state from assessing a property tax on any property which has acquired an actual business situs, exclusively within that state. See, Utah v. Aldrich and Curry

[7]See, American Trucking Associations, Inc. v. Scheiner, 483 U.S. 266 (1987); Armco, Inc. v. Hardesty, 467 U.S. 638 (1984); Container Corporation of America v. Franchise Tax Board, 463 U.S. 159 (1983); and Tyler Pipe Industries v. Washington Department of Revenue, 483 U.S. 232 (1987).

Another excise tax case, Commonwealth Edison Co. v. Montana, 453 U.S. 609 (1981), which upheld a state tax on a local aspect of interstate activity, and which is cited by Amici Curiae on page 7 of their Jurisdictional Brief, also fails to offer guidance in this case. Although intrastate activity (such as mining) may form a part of a larger interstate activity (such as the shipment of coal to other states), and thus, may require Commerce Clause scrutiny, the tax in the instant case was imposed on exclusively intrastate property and not on an intrastate aspect of interstate activity.

v. McCanless, supra.

The remainder of the cases relied upon by FMCC are distinguishable cases involving tangible personal property which had either moved or which was about to move in the stream of interstate commerce so as to require an apportionment between the states through which the property had moved. See, for example Pullman's Palace Car Co. v. Commonwealth of Pennsylvania, 141 U.S. 18 (1891).

The cases involving tangible personal property moving through interstate commerce are factually and legally distinguishable from the situation where property has an actual situs exclusively in one state and a fictitious situs at the place of domicile. See Curry v. McCanless and Utah v. Aldrich, supra.

None of the cases relied upon by FMCC present the factual situation arising in this case, that is: a tax on property which

has acquired an actual situs soley within the taxing state, and which maintains that business situs within the state.

Nor does the remote spectre of double taxation have constitutional significance where the underlying facts fall squarely within the realm of constitutional taxation articulated by Curry v. McCanless and Utah v. Aldrich, supra.

Although there is no record of double taxation in this case, under Curry v. McCanless and Utah v. Adlrich, it has long been established that double taxation of intangible personal property by both the domiciliary state and the state acquiring actual situs would be constitutionally permissible. See, Utah v. Aldrich and Curry v. McCanless, supra.

The rationale of these decisions is that the taxpayer receives separate benefits from both the domiciliary state and the state where it conducts business

and receives protection of its assets. Double taxation under these circumstances is fair.

Applying this rationale to the facts of the instant case, it is clear that Florida confers numerous benefits and protections upon the property which it taxes. FMCC secures and protects its intangibles by placing liens upon Florida tangible personal property, utilizing the services of the Florida Department of Motor Vehicles and the Florida Secretary of State. If a debtor were to default, FMCC has access to Florida's Courts. Without these protections, FMCC's intangible personal property in Florida would be uncollectable from Florida debtors, and hence, valueless.

Although FMCC seeks to distinguish Curry v. McCanless and Utah v. Aldrich as Due Process cases, a tax which is "fair" for the purposes of the Due Process Clause will never place an "undue burden" on

interstate commerce. FMCC has not cited a single case which has held that a tax is "fair" for purposes of the Due Process Clause but which also holds that the same tax "unduly burdens" interstate commerce.

In fact, as noted by the First District Court of Appeals below, when a tax passes Due Process Clause standards, that tax will generally pass Commerce Clause standards also. See, Ott v. Mississippi Valley Barge Line Co. 336 U.S. 169 (1949). App. 3 of FMCC's Jurisdictional Statement.

The relationship between the Commerce Clause and the Due Process Clause is more than "coincidental," as argued by FMCC on page 13 of its Jurisdictional Statement. Both the Commerce and Due Process Clauses are concerned with fairness. In the Due Process Clause context, the issue is fundamental fairness. In the Commerce Clause context, the issue is fair "apportionment" whenever apportionment

is necessary to avoid an undue burden on interstate commerce.

In this case, apportionment is not necessary because the property actually maintained a business situs within Florida and the record does not reflect that the factors which tied the intangibles to Florida have altered or diminished over time.

Moreover, these incidental tax costs are not a "burden" on interstate commerce but instead, are a proper payment to the State and are fairly related to the benefits enjoyed in the State.

This Court has never expressed an intention to drive a wedge between the Due Process and Commerce Clauses. A tax which is fair for Due Process purposes will not unduly burden interstate commerce.

To distinguish Curry v. McCanless and Utah v. Aldrich on the sole basis that the taxes in those cases were challenged on

slightly different but closely related constitutional grounds would create an irreconcilable conflict between the Commerce Clause and the Due Process Clause.

Moreover, a departure from the principles articulated in Curry v. McCanless and Utah v. Aldrich would result in discrimination against small intrastate business by allowing large interstate business to receive full and separate benefits from more than one sovereign at no additional cost.

This Court should continue to recognize the long standing distinction between apportionment of taxation on interstate activities and the right to impose an undiminished tax on intangible property actually located, at all pertinent times, within the taxing state. Recognition of this right to tax intrastate property should not diminish the obligation of corporations engaged in interstate commerce

to pay toward the support of their lawful sovereign, should that sovereign ever decide to impose a tax in exchange for the benefits which it confers upon its corporate domiciliaries.

The rulings in Curry v. McCanless and Utah v. Aldrich, supra, are the only cases cited by either party which expressly deal with the issue of double taxation in the context of intangible personal property. The findings that such double taxation is "fair" for Due Process purposes, cannot mean that the same tax is "unfair" for Commerce Clause purposes.

Only by referring to inapplicable apportionment concepts can FMCC create sufficient confusion so as to drive a wedge between closely related Commerce Clause concepts of fairness and Due Process Clause concepts of fairness.

Although FMCC refers to a "consistent" test, it advocates a position which is

completely inconsistent with the decisions in Curry and Utah. FMCC advocates a position which, if followed by the Court, would create inconsistency between integrally related clauses of the United States Constitution.

It is reasonable and consistent to distinguish between apportionment of nationwide activity between the states and the rights of states to impose a full and undiminished tax on property which is actually situated within its boundaries, in exchange for the fairly related benefits conferred on that property.

It is reasonable and consistent to distinguish between apportionment of nationwide activity between the states and the rights of domiciliary states to impose a full and undiminished tax on the interstate property of its corporate taxpayers, in exchange for the fairly

related benefits which the sovereign confers upon each of its taxpayers.

B. BECAUSE THE TAXED PROPERTY NEVER CROSSED STATE LINES TO ENTER THE STREAM OF INTERSTATE COMMERCE, THE COMMERCE CLAUSE IS INAPPLICABLE.

As discussed previously, there has been no showing that the accounts receivables ever crossed state lines to enter the stream of interstate commerce. Motor vehicles and other tangible property entered the stream of interstate commerce but the tax at issue was not imposed upon those tangibles. Instead, the tax was imposed upon accounts receivables which had an actual business situs in Florida.

That evidence of the underlying obligations (as opposed to the actual underlying obligations) later crossed state lines is of no significance. 84 C.J.S. Taxation §320 (1954). Situs for taxation purposes is not restricted to the place

where the certificates representing the intangibles are subsequently located. See, for example, Utah v. Aldrich, supra.

The tax was not imposed upon the documents themselves. Rather, the tax was imposed upon the underlying obligations represented by the promissory notes.

The concepts of "movement" and "flow of commerce" are fundamental to a proper disposition of this case. The taxation of property cannot offend the interstate commerce clause where that property has no actual situs (as opposed to fictitious domiciliary situs) outside the boundaries of the single taxing state and where that property remains, at all times, intrastate and outside of the stream of interstate commerce.

This topic is discussed in PAUL J. HARTMANN, FEDERAL LIMITATIONS ON STATE AND LOCAL TAXATION, at pages 382-388 (1981). At page 383, the author notes: "[t]he cases

seem to establish that when the Court finds that the property comes to rest because of the owner's business reasons (to secure some 'independent local advantage'), the commerce clause affords no protection from taxation."

The author discusses the history of state efforts to tax property entering its borders. The author explains that prior to Complete Auto Transit, Inc. v. Brady, 430 U.S. 274 (1977), which permitted states to fairly tax the importation process, taxation was restricted to property which had "come to rest" within the state. That is, if the property was still in the stream of interstate commerce, it could not be taxed.

Two of the cases cited by Professor Hartmann at page 383, 384 illustrate the concept of "flow of commerce." Those cases are Minnesota v. Blasius, 290 U.S. 1 (1933)

and General Oil Company v. Crain, 209 U.S. 211 (1908).

In Minnesota v. Blasius, the Court upheld a property tax on cattle which had crossed state lines into Minnesota, coming to rest within that state. The Court noted:

> The tax was assessed on the regular tax day while Blasius thus owned and possessed them. The cattle were not held by him for the purpose of promoting their safe or convenient transit. They were not in transit. Their situs was in Minnesota where they had come to rest. There was no federal right to immunity from the tax.
>
> 290 U.S. at 12

General Oil Company v. Crain, supra, also permitted taxation of property which was previously in movement through interstate commerce on the theory that the property had come to rest within the boundaries of the taxing state.

Minnesota v. Blasius and General Oil remain good law insofar as states continue to be able to tax property at rest within

their boundaries. Although Complete Auto further expanded state taxing authority, allowing states to directly tax the flow of commerce, nothing in Complete Auto extends the immunity of the Commerce Clause to property which remains, at all times, intrastate.

Since flow of commerce concepts are, for the most part, taken for granted, there is not an abundance of current discussion on the subject of "flow." However, in a 1976 decision of the Court interpreting the closely related Import/Export Clause, the Court upheld state taxation of tires that had come to rest and mingled with the mass of property in the state. See, Michelin Tire Corp. v. Wages, 423 U.S. 276 (1976).

However, the instant case presents even less cause for Commerce Clause scrutiny than Minnesota v. Blasius, General Oil Co. v. Crain, or Michelin Tire Corp. v. Wages. The instant case is wholly void of

Interstate Commerce concerns because the intangible property never moved at any pertinent time.

In the above cases, the argument focused on whether the taxed property had "come to rest." In the instant case, the intangibles never moved in interstate commerce to begin with. Moreover, the record does not demonstrate that the intangibles were about to be moved.

The only movement in interstate commerce was the movement of vehicles across state lines and the subsequent shipment of promissory notes outside of Florida, after the notes were executed by Florida debtors. Since the tax is neither upon the vehicles nor the documents, but rather, upon the underlying obligations of the debtors, FMCC has failed to demonstrate the applicability of the Interstate Commerce Clause to a tax on its stationary intrastate property.

C. WHERE THE TAXED PROPERTY IS NOT IN INTERSTATE COMMERCE, THE "INTERNAL CONSISTENCY TEST" DOES NOT APPLY BECAUSE THERE IS NO NEED TO APPORTION

The taxed property never entered the stream of interstate commerce. The record does not show that any of the factors which tied the intangible personal property to the state of Florida were altered or diminished at any pertinent time.

Internal consistency is an apportionment standard. There is no need to apportion here because Florida did not tax any property outside of the boundaries of Florida. If Florida sought to tax FMCC's nationwide intangible personal property, it would then have to apportion and tax only a fair share of nationwide intangible personal property.

However, the record does not reveal what amount of <u>nationwide</u> intangible personal property is owned by FMCC. This

is because Florida did not seek to apportion a share of <u>nationwide</u> intangible personal property. Instead, Florida sought only to tax that portion of FMCC's intangible personal property which had acquired an actual situs solely within the boundaries of Florida.

The "Internal Consistency Test," which limits state taxation of interstate activity, does not restrict a state from annually assessing a property tax on any property which has acquired a legitimate situs within the state on the date of annual property tax assessment.

There is no record of actual double taxation in this case. Moreover, the hypothetical method articulated as the "Internal Consistency Test," which reduces the potential for unduly burdensome <u>excise</u> taxation is inapplicable to state taxation of intrastate intangible personal property.

The historical method for determining whether an excise tax violates Due Process or the Commerce Clause is to determine whether the tax "fairly apportions." By contrast, such tests are inherently and historically inapplicable to a tax on property which is located, at all pertinent times, within a state of actual situs.[8] See, Curry v. McCanless and Utah v. Aldrich, which upheld a similar tax.

While "fairness" equally applies in the area of property taxation, "fair apportionment" cannot apply to intangible personal property which has acquired an actual business situs solely within the taxing state. Only if the non-domiciliary

[8]Contrary to the assertion of Amicus Curiae at page 10 of their Jurisdictional Brief, Florida is not attempting to argue that there is anything "talismanic" about intangible personal property taxes. Rather, Florida argues that there is no need to use apportionment tests in this case because the taxed property was located solely intrastate and never crossed state lines.

state sought to impose a tax on nationwide intangible personal property would an apportionment be necessary. It would then be necessary to apportion the share of nationwide property which the non-domiciliary state could tax.

Furthermore, the apportionment issues which arise in the case of tangible personal property, such as railroad cars, which <u>are in movement within the stream of interstate commerce</u> are not before this Court. The intangible personal property in this case, is not akin to railroad cars, or other tangible personal property which is frequently <u>in transit</u> within the stream of interstate commerce. In the instant case, the <u>actual</u> situs of intangible personal property was determined. Florida, where the intangible property is actually located, is entitled to impose its tax on that intrastate property.

Although a domiciliary state has long been entitled to impose an undiminished property tax upon each and every one of its taxpayers, this does not alter that the instant property was stationary, at all pertinent times, within the boundaries of the state of actual situs. The record does not reveal that the intangibles were in transit at any pertinent time, either in transit to the domiciliary state, or in transit toward any third state. Were the intangibles in transit at a pertinent date, such as the date of taxation, a Commerce Clause issue might then arise as to those particular intangibles in transit. This is not the case here.

There is a valid purpose served by the historical distinction between excise taxes and intangible personal property taxes. Situs rules, when properly applied to stationary intrastate intangible personal property, limit to two states the number of

states which could legitimately claim a right to tax that stationary intangible personal property. This reduces the risk of excessive multiple taxation, just as apportionment standards reduce the risk of excessive multiple taxation in the excise tax context.

The risk of triple taxation which is argued by FMCC is clearly a hypothetical risk (if even a hypothetical risk exists) because FMCC has not even demonstrated double taxation.

Although FMCC has not cited any case authority mandating the division of an intrastate intangible tax base between a state of actual situs and the state of domicile, a result contrary to Utah v. Aldrich, and Curry v. McCanless, supra, FMCC has cited an article from an individual author which questions the constitutionality of Florida's tax.

There is a fundamental contradiction in the author's underlying premise. Commerce Clause considerations are appropriate in income and excise tax cases wherein the transactions (or portions of the transactions) transcend state boundaries. The very purpose of apportionment is to provide a means for assigning a ratable part (i.e., assigning situs) to each respective state.

Where the taxable situs of a given property, intangible or tangible, can be definitely established because its location is fixed or determinable as being within a given state, assignment by apportionment is not required. Commerce Clause considerations (including the "internal consistency test") are wholly inappropriate.

FMCC repeatedly cants double taxation and relies upon an individual author's opinion in support of its argument.

However, FMCC omits mentioning a crucial fact.

Because FMCC is a foreign domiciliary, only that portion of its aggregate intangibles which have acquired an actual situs in Florida are included in the tax base under Florida law. If, for the sake of argument, the potential for double taxation were to be eliminated by the Court, Florida would then be entitled to tax a percentage not only of the Florida tax base but of the nationwide intangibles belonging to FMCC.

It is unknown from the record whether a percentage of FMCC's nationwide intangibles would be a greater or lesser sum than the intrastate tax base which was utilized in this case. Therefore, it is hard to envision how Florida's geographically restricted tax base unduly burdens interstate commerce when applied to a non-domiciliary corporation.

FMCC has failed to demonstrate any of the following propositions: that the "internal consistency test" applies to the instant intangible personal property tax; that double taxation exists; that a need to apportion exists; or that Curry and Utah are distinguishable on the facts.

Wherefore, the appeal from the decision below should be dismissed or affirmed for want of a substantial federal question, because Curry and Utah are well established precedent and clearly govern the issue of double taxation of intangible personal property by both the domiciliary state and the state of actual situs.

D. INASMUCH AS FMCC, A FOREIGN DOMICILIARY, IS UNAFFECTED BY THAT SECTION OF FLORIDA'S INTANGIBLE PERSONAL PROPERTY TAX WHICH IS EXCLUSIVELY APPLICABLE TO FLORIDA DOMICILIARIES, FMCC LACKS STANDING.

By FMCC's own admission, FMCC is not a Florida domiciliary. Therefore, FMCC is

without standing to challenge that portion of Florida's tax statutes, expressed in Fla. Stat. §§199.032(1), 199.052(1) (1983), which imposes a tax on the nationwide intangible personal property of a Florida domiciliary. See, Florida Steel Corp. v. Dickinson, 328 So.2d 418 (Fla. 1976).

FMCC, as a foreign corporation, was not taxed on its nationwide intangible personal property.[9] Instead, FMCC, as a foreign domiciliary, was taxed solely upon that portion of its intangible personal property which had acquired an actual business situs in Florida.

The keystone case on standing is Valley Forge Christian College v. Americans United For Separation of Church and State, 454 U.S. 464 (1982). As this Court stated in

[9]Amicus Curiae, like FMCC, are foreign corporations and lack standing to challenge that portion of Florida's intangible tax statute which applies exclusively to Florida domiciliaries.

that case, the party bringing an action must show that:

> 1. The party has suffered some actual or threatened injury as a result of the putative illegal conduct of the defendant;
>
> 2. That the injury can be traced to the conduct of the defendant;
>
> 3. That the injury is likely to be redressed by a favorable decision.
>
> Id., at 472.

Plaintiff, as a foreign domiciliary, is unable to establish these elements when it alleges that Florida should not tax Florida domiciliaries on their nationwide intangible personal property.

Moreover, this Court has held that when a plaintiff is seeking a declaratory judgment that a state statute is unconstitutional, the requirements for standing must be strictly enforced. See, Griswold v. Connecticut, 381 U.S. 479, 481 (1965).

Furthermore, as this Court has previously noted, a federal court is constrained by the Constitution to decide only live cases and controversies. U.S. Const. art. III, §2. Federal courts may not render advisory opinions on abstract or hypothetical propositions of law. Hall v. Beals, 396 U.S. 45, 48 (1969)(per curiam).

FMCC asks this Court to decide, on a hypothetical or abstract basis that if Michigan were to pass an identical tax to that which Florida has passed, that FMCC would then be required to pay taxes to both Michigan and Florida on the same Florida based intangible personal property. This, FMCC, argues, is unconstitutional, notwithstanding the decisions in Curry v. McCanless and Utah v. Aldrich, supra.

The Court in Curry v. McCanless and Utah v. Aldrich was confronted with an actual case of double taxation. The Court is not directly confronted with that issue

in this case because double taxation has not been established.

CONCLUSION

For the foregoing reasons, this Court should dismiss the appeal or affirm the decision below for want of a substantial federal question (if the Jurisdictional Statement is treated as a direct appeal) or decline review (if the Jurisdictional Statement is treated as a Petition for Certiorari).

Respectfully submitted,

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APPENDIX

Prehearing Stipulation

Exhibit 7

FMCC operated in a competitive marketplace at both a retail and wholesale level. Most, though not all, authorized Ford dealers used the FMCC wholesale dealer plan. FMCC also handled retail and, on a very infrequent basis, wholesale financing for used cars regardless of the manufacturer so long as the used car was in the inventory of a dealer with whom FMCC had a relationship.

At the wholesale level, the local Florida FMCC branch solicited participation by Florida Ford dealers. While some dealers did not use the FMCC plan, most did. There was no requirement that the dealer use the FMCC plan.

To use the FMCC plan, the dealer would complete an Application for Wholesale Financing and Security Agreement, which

included a designation of FMCC in Dearborn as the attorney-in-fact for the dealer. This designation authorized the execution of promissory notes and security instruments necessary for the wholesale financing plan. The FMCC branch assembled information from the dealer and undertook a financial investigation of the dealer. The amount of the line of credit sought by the dealer was the principal factor in determining whether the FMCC branch or headquarters components in Dearborn authorized the arrangement. During 1980 and 1981, the number of dealers approved locally was approximately 6%. In May 1982, based on greater authority having been given to all branches, the number of branch approvals increased to approximately 35%.

If approval was given, the FMCC branch notified the Ford Motor Co. district sales office ("DSO") in Jacksonville, Florida.

If approval was given by a FMCC headquarters component in Dearborn, the FMCC branch was notified by Dearborn of that fact and the branch notified the DSO.

The dealer ordered cars through the DSO, which in turn placed the order with the appropriate assembly plant none of which were located in Florida. The certificate of origin usually accompanied the car to the dealer but, except for infrequent occasions, did not go through the branch in any event. At the time of delivery to the carrier, the dealer's attorney-in-fact, an FMCC/Dearborn employee, authorized the draw against the dealer's line of credit with FMCC. FMCC credited Ford Motor Co.'s account for the amount of the vehicle.

The dealer made monthly payments to the Florida FMCC branch, which in turn made daily deposits to an account with a Florida

financial institution. The FMCC branch received instructions from FMCC headquarters in Dearborn on the amount of money to be retained in this account. The FMCC branch called Mellon Bank, which was not in Florida, daily and Mellon arranged for the transfer of the balance. The wire transfer was always made to the same "pooling bank" in Pittsburgh, Pennsylvania. While the branch deposited money to the Florida bank, the branch drew its funds only from a Detroit, Michigan bank. None of the "wholesale" deposits could be used by the branch for use in financing retail transactions, or any other purpose.

When the dealer sold the car either at retail or via dealer trade, the dealer made its payment on the wholesale receivable to the Florida FMCC branch. Notice then was

given to Dearborn to cancel the "wholesale" indebtedness. The dealer satisfied the principal balance due on the car. Within ten working days after month end, the FMCC branch billed the dealer for the monthly accrued interest. The dealer satisfied this amount by the billed month end (e.g. - a car is sold May 10, the dealer pays FMCC the principal amount on May 10, the interest is computed for the period May 1 - May 10, FMCC bills the dealer before the end of the first week of June, and the dealer pays the May 1 - May 10 interest by June 20). The FMCC branch would include other funds as a part of the regular "wholesale" deposits to the Florida bank.

The FMCC branch could engage in direct floor plan financing when "dealer trade" occured. This transaction is explained as

follows: Dealer Red had a red car. Dealer white had a white car. White sells the white car to Red and receives a check from Red payable to White. White also wants a car to sell so he gets the red car, too. White goes to FMCC branch, gets a check for Red, finances the red car and pays off the Red. Red now has and sells the white car. White now has: paid off FMCC for the white car; "brought" the red car; and financed the red car with the FMCC branch (not Dearborn). The dealer also could simply transfer the car to another dealer subject to approval by the FMCC branch. Under the terms of the transfer, FMCC's security interest would simply to be transferred with the car to the new dealer.

Aside from handling dealer money and dealer trades, the FMCC branch also performed audits of dealers to insure cars were not sold out of trust (i.e., without

notice of the sale and satisfaction of the indebtedness owed to FMCC).

The Florida FMCC branches also were involved in wholesale and retail financing of tractors and farm equipment. At the retail level, the process was identical to the process used for cars, although a UCC statement was filed in the State of Florida for items to be kept in Florida. At the wholesale level, the dealer provided the FMCC branch with a promissory note covering the entire line of credit. Documentary stamps were affixed locally (i.e. in Florida) to the notes and notes were retained locally. The dealer, however, ordered the tractor through the same mechanism used for cars and FMCC paid For[d] Motor Co. in Michigan. If the dealer exceeded the amount on the note, a new additional note with stamps affixed was obtained.

At the retail level, FMCC activelycompeted with local banks to provide financing. The dealer could submit a proposed retail contract to FMCC and other institutions for financing to maximize the likelihood that the customer would obtain financing appproval and thereby complete a sale. The retail application was submitted to the FMCC branch, which conducted a financial check on the consumer. If the deal were accepted, the dealer satisfied its wholesale obligation on the vehicle. Simultaneously or shortly thereafter, the dealer formally assigned the financing contract to FMCC. The dealer then could either: 1) present the contract to the FMCC branch and get a check directly, which was rare; or 2) prepare and submit a sight draft to a Florida bank for payment. If the FMCC branch paid the bank with the

FMCC Michigan check the same day the draft was presented, the bank paid the dealer on the sight draft through normal banking channels. FMCC and the dealer exchanged checks - they did not simply use accounting book entries to eliminate the wholesale receivable.

The dealer received the principal amount (purchase price less the down payment) from the FMCC branch on the retail financing contract. The dealer could "sell" the note to FMCC under a repurchase or without recourse provision. Under the repurchase provision, if the purchaser defaulted, FMCC repossessed the car and presented it to the dealer for repurchase. If the note were with recourse, FMCC handled the problem directly FMCC repossessed the car, and sold it at the automobile wholesale auction.

If the retail financing contract was

approved, the Florida branch sent the original financing contract to Dearbornwhich maintained the original contract in Michigan. The FMCC branch prepared a report, and sent the amount owed for Florida documentary stamps to the state on a montly basis. The FMCC branch retained the car title, a copy of the financing contract, and background financial information on the consumer. Absent some direct communication by the purchaser or a problem with delinquency, the branch would not hear from or see the consumer.

The consumer received a payment coupon book. Payment was made to a FMCC in care of a Florida financial institution which handled the money in accordance with FMCC/Dearborn instruction. A consumer could also make walk-in payments directly at a FMCC branch. However, the branch

had no control over these funds. Reports of payments were sent to Dearborn by the payment center. Dearborn then provided the branch with updated computer information on the account by account number and amount. When a zero dollar balance was achieved, the loan was satisfied, and the branch sent the Department of Motor Vehicles a notice that the lien was satisfied. The car title would be sent to the consumer. If the consumer sold or traded the car prior to paying off the loan, the branch received the final payment and released the title. If the branch received either a final or interim payment by the consumer, those funds were deposited into the same Florida bank account as the "wholesale" payment received from the dealer. Accordingly, the branch could not utilized those funds either.